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No. 82-206 and 82-229 (Consolidated)

IN THE

# Supreme Court of the United States

October Term, 1983

FIREFIGHTERS LOCAL UNION No. 1784,
*Petitioner,*
v.
CARL W. STOTTS, *et al.*,
*Respondent.*

MEMPHIS FIRE DEPARTMENT, *et al.*,
*Petitioners,*
v.
CARL W. STOTTS, *et al.*,
*Respondent.*

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

## BRIEF FOR THE CITY OF DETROIT *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

DONALD PAILEN
Corporation Counsel
FRANK JACKSON*
Deputy Corporation Counsel
1010 City County Building
Detroit, Michigan 48226
(313) 224-4539

*Counsel of Record

*Attorneys for Amicus*

Interstate Brief & Record Co., Suite 731, David Whitney Building, Detroit, MI 48226
(313) 962-8745

## TABLE OF CONTENTS


| | Page |
|---|---|
| Table of Authorities | ii |
| Interest of Amicus | 1 |
| Summary of Argument | 3 |
| Argument: | |
| I. CONGRESS INTENDED TITLE VII REMEDIES TO ADDRESS ADVERSE PUBLIC SAFETY CONSEQUENCES OF PRIOR DISCRIMINATION | 4 |
| II. THE DISCRETION EXERCISED BY THE DISTRICT COURT IN THIS CASE SERVED CRITICALLY IMPORTANT PUBLIC SAFETY CONSIDERATIONS | 7 |
| A. The Experience Of The City Of Detroit | 8 |
| B. The Experience Of The Other Communities | 13 |
| Conclusion | 17 |

## TABLE OF AUTHORITIES

Page

**Cases:**

*Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975) 6

*Baker* v. *City of Detroit*, 483 F. Supp. 930 (E.D. Mich. 1979), *aff'd sub nom. Bratton* v. *City of Detroit*, 704 F.2d 878 (6th Cir. 1983), *cert. pending*, No. 83-551 ..... 2, 8, 9, 10, 11, 12

*Boston Chapter, N.A.A.C.P., Inc.* v. *Beecher*, 679 F.2d 965, (1st Cir. 1982), *remanded sub nom. Boston Firefighters Union, Local 718* v. *Boston Chapter N.A.A.C.P.*, 103 S.Ct. 2076 (1983)..... 15

*Boston Firefighters Union, Local 718* v. *Boston Chapter, N.A.A.C.P.*, 103 S.Ct. 2076 (1983) .... 7

*Bridgeport Guardians, Inc.* v. *Members of the Bridgeport Civil Service Comm'n*, 482 F.2d 1333 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1975) 15

*Detroit Police Officers' Ass'n* v. *Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981)..... 2, 13, 14, 15, 16

*Detroit Police Officers' Ass'n* v. *Young*, 446 F. Supp. 979 (E.D. Mich. 1978) ..... 2

*Franks* v. *Bowman Transp. Co.*, 424 U.S. 747 (1976) 6

*Louisiana* v. *United States*, 380 U.S. 145 (1965) ... 6

*Murphy* v. *Hunt*, 455 U.S. 478 (1982)..... 1

Page

*N.A.A.C.P., Detroit Branch* v. *Detroit Police Officers' Ass'n*, 525 F. Supp. 1215 (E.D. Mich. 1981) ..... 2, 3

*Talbert* v. *City of Richmond*, 648 F.2d 925, 931 (4th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982) ... 15

*Van Aken* v. *Young*, 541 F. Supp. 448 (E.D. Mich. 1982), *appeal pending*, No. 82-1570 (6th Cir.) ..... 3, 12, 13

*United States* v. *N. L. Indus. Inc.*, 479 F.2d 354 (8th Cir. 1973) ..... 6

*United Steelworkers of America* v. *Weber*, 443 U.S. 193 (1979) ..... 7

**Legislative History:**

118 Cong. Rec. 789-811 (1972) ..... 6

110 Cong. Rec. 6548 (1964) ..... 7

H.R. Rep. No. 92-238, 92nd Cong., 1st Sess. 17 (1971) ..... 5

S. Rep. 92-415, 92nd Cong., 1st Sess. 10 (1971) .. 5

**Other Authorities:**

U.S. Commission on Civil Rights, *Who is Guarding the Guardians: A Report on Police Practices* (1981) 16

U.S. Commission on Civil Rights, *Confronting Racial Isolation in Miami* (1982) ..... 16

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On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

## BRIEF FOR THE CITY OF DETROIT *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

## INTEREST OF AMICUS

This case raises questions regarding the ability of a district court to preserve gains achieved under a remedial decree when fiscal considerations require a municipality to achieve economies.[1] A crucial factor that should be considered by the Court is the operational need of public service agencies that have discriminated in the past to maintain adequate minority representation among their employees, in order to preserve public confidence. The City of Detroit has extensive experience with this problem and has been engaged in litigation concerning the operational needs of its police and fire departments.

The City of Detroit has suffered severe public safety problems as the result of prior discriminatory practices by its public safety agencies, and a failure to correct the effects of that discrimination. For the past nine years Detroit has implemented affirmative action programs to eradicate the effects of past discrimination against minorities and the debilitating effects of that discrimination on the ability of its public safety agencies to function effectively.

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[1] For the purposes of this brief, *Amicus* has assumed that the issues identified by Petitioners are properly before the Court. However, *Amicus* notes its agreement with Respondents that the case is moot as to the original complainants. Moreover, *Amicus'* own experience demonstrates that the questions do not fall within the narrow category of cases that are "capable of repetition, yet evading review." *See Murphy* v. *Hunt*, 455 U.S. 478, 482 (1982). Public sector layoffs are not necessarily short-term. The City of Detroit has unfortunately found it necessary to engage in layoffs for extended periods. For example, Detroit laid off 690 police officers on September 5, 1980; more than half of them remain on layoff status. On January 12, 1979 the City laid off 97 firefighters; some of them were not recalled until March 22, 1982.

Presently pending are two cases brought on behalf of white police officers and one case brought by white applicants for firefighter positions which challenge the legality of the race-conscious affirmative action plans of Detroit's police and fire departments. In *Detroit Police Officers, Ass'n* v. *Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981), the United States Court of Appeals for the Sixth Circuit reversed and vacated the judgment of the District Court for the Eastern District of Michigan, *see Detroit Police Officers' Ass'n* v. *Young*, 446 F. Supp. 979 (E.D. Mich. 1978), which had enjoined operation of that part of the City's affirmative action plan which had imposed a 50/50 black-white ratio for promotion to the rank of sergeant. The case was remanded to the District Court for further findings of fact and consideration of constitutional issues in light of the standards set forth by the Circuit Court. *See* 608 F.2d at 697-98. The case remains before the District Court on remand. In *Baker* v. *City of Detroit*, 483 F. Supp. 930 (E.D. Mich. 1979), *aff'd sub nom. Bratton* v. *City of Detroit*, 704 F.2d 878 (6th Cir. 1983), *cert. pending*, No. 83-551, the Court upheld the legality of that part of the City's affirmative action program imposing a 50/50 black-white ratio for promotions to the rank of lieutenant.[2] The plaintiffs in *Baker* have filed a petition for a writ of certiorari, which is pending.

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[2] A related case, *N.A.A.C.P., Detroit Branch* v. *Detroit Police Officers' Ass'n*, 525 F. Supp. 1215 (E.D. Mich. 1981), involves a challenge to seniority based layoffs. The City and the union representing police officers are being sued for the failure to agree on feasible alternatives to the collectively bargained reverse seniority sequence layoffs. That failure threatens to undermine the remedial effects of the City's affirmative action program. The District Court granted in part and denied in part cross motions for summary judgment and the case awaits further development of the factual record.

*(Continued on following page)*

In *Van Aken* v. *Young*, 541 F. Supp. 448 (E.D. Mich. 1982), *appeal pending*, No. 82-1570 (6th Cir.), the Court upheld an affirmative action plan under which qualified blacks were hired as firefighters over whites with higher examination scores.

We believe that Detroit's experience with remedying the effects of longstanding racial discrimination in its police and fire departments by means of affirmative action may provide an important perspective to the issues presented in this case.

## SUMMARY OF ARGUMENT

Petitioners' contention that a district court has no authority to require a city to achieve economies in ways that do not undermine gains made pursuant to a remedial decree represents on unduly narrow vision of Title VII's remedial purposes and ignores many facets of the problem caused by longstanding patterns of discrimination and exclusion. One such aspect of the problem is the mistrust and antagonism that have developed in our cities between public safety agencies and minorities as a result of years of exclusion of minorities from employment in such agencies. Reliance on reverse seniority sequence layoffs as the only means

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(*Continued from preceding page*)

The challenged action in *N.A.A.C.P., Detroit Branch* is fundamentally different from the action challenged in *Stotts*. The Memphis Fire Department challenges the power of the District Court to order a remedy for racial discrimination. In *N.A.A.C.P., Detroit Branch*, the plaintiffs challenge the City of Detroit's failure to violate its collective bargaining agreement with the Detroit Police Officers' Association (DPOA) in order to insure that layoffs would not disproportionately affect black officers. The plaintiffs in *N.A.A.C.P., Detroit Branch*, allege that the City's attempt to negotiate an affirmative action layoff plan with the DPOA was not sufficient. Despite the strong opposition of the DPOA, the plaintiffs in *N.A.A.C.P., Detroit Branch*, maintain that the City was under a duty to unilaterally violate the collective bargaining agreement.

of addressing Memphis' fiscal crisis would have served to resegregate its fire department and thereby exacerbate existing racial tensions. While it is important for all public service agencies to be able to maintain the remedial gains achieved by affirmative action programs when they become threatened by fiscal troubles, several types of agencies have a particularly critical need. Police departments, fire departments, schools and correctional institutions have extremely important operational needs because of greater public safety concerns or their close relationships with the public. The experience of the City of Detroit is particularly instructive in this regard.

## ARGUMENT

### I.

### CONGRESS INTENDED TITLE VII REMEDIES TO ADDRESS ADVERSE PUBLIC SERVICE CONSEQUENCES OF PRIOR DISCRIMINATION

In 1972, Congress amended Title VII to extend its coverage to state and local governments. An overriding concern was the need to develop effective programs to remedy the history of exclusion of minorities from employment in public service jobs in many communities. There is no doubt that Congress intended Title VII to provide compensation for the employees and applicants for employment who were the direct victims of these discriminatory practices. However, Congress' concern went beyond the need to "make whole" these direct victims. Congress recognized that the public is the ultimate victim of such discriminatory practices and that undoing the harm to the public interest is another goal of Title VII. For example, the 1972 Report to the Senate Committee on Labor and Public Welfare stated:

> The failure of State and local governmental agencies to accord equal employment opportunities is particularly distressing in light of the importance that these agencies play in the daily lives of the average citizen. From local law enforcement to social services, each citizen is in constant contact with many local agencies . . . . Discrimination by government therefore serves a doubly destructive purpose. The exclusion of minorities from effective participation in the bureaucracy not only promotes ignorance of minority problems in the particular community, but also creates mistrust, alienation and all too often hostility towards the entire process of government.

S. Rep. 92-415, 92nd Cong., 1st Sess. 10 (1971).

Congress was particularly concerned with protecting the operational ability of public safety agencies to provide effective protection of the public:

> The problem of employment discrimination is particularly acute and has the most deleterious effect in those government activities which are most visible to the minority communities (notably education, law enforcement, and the administration of justice) with the result that the credibility of the government's claim to represent all the people is negated.

H. R. Rep. No. 92-238, 92nd Cong., 1st Sess. 17 (1971).

Senator Harrison Williams, Chairman of the Labor and Public Welfare Committee and sponsor of the bill in the Senate, emphasized the Congressional concern for the ability of units of State and local government to carry out their assigned responsibilities. He stated that the Committee

had acted out of a belief that their work was "essential to the viability of State and local governmental units." 118 Cong. Rec 789-811 (1972). In large part, the Committee's concern with employment discrimination was based upon the unfavorable impact which it had on "the ability of . . . governmental units to deal equitably in their contacts with those groups against whom they discriminate in employment." *Id.* As Senator Williams succinctly phrased the matter, "if they are to carry out their jobs with any success whatever, public confidence in their impartiality is vital." *Id.*

This explicit Congressional concern for protecting the ability of local governmental agencies to carry out their essential functions requires a construction of Title VII that permits use of racial criteria, when needed, to assist in the provision of public services. To this end, it supports not only the implementation of affirmative action programs, but the decision to maintain the gains achieved under such programs in subsequent years of fiscal troubles.

The precedents interpreting Title VII are consistent with this Congressional desire to remedy the adverse public service consequences of prior discrimination. The Court has repeatedly concluded that "make whole" relief is only "*one* of the central purposes of Title VII." *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 763 (1976) (emphasis added). Other critical goals of Title VII are "to eliminate, so far as possible, the last vestiges of an unfortunate and ignominous page in this country's history," *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975) (quoting *United States* v. *N. L. Indus. Inc.*, 479 F.2d 354, 379 (8th Cir. 1973)), to "eliminate the discriminatory effects of the past as well as bar like discriminaion in the future," *id.* (quoting *Louisiana* v. *United States*, 380

U.S. 145, 154 (1965)), and to " 'open employment opportunities for Negros in occupations which have been traditionally closed to them.' " *United Steelworkers of America* v. *Weber*, 443 U.S. 193, 203 (1979) (quoting 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey)).

Adverse public safety consequences are a vestige of past discrimination that must be addressed in Title VII remedies involving local governments. The experience of the City of Detroit and other communities demonstrates the strong link between prior discrimination and the current public safety crisis.

## II.

## THE DISCRETION EXERCISED BY THE DISTRICT COURT IN THIS CASE SERVED CRITICALLY IMPORTANT PUBLIC SAFETY CONSIDERATIONS

A ruling that Title VII prevents the District Court from requiring that fiscal cutback programs preserve the gains achieved pursuant to remedial decrees would severely undermine the effectiveness of public services agencies. Such a ruling would be particularly destructive to law enforcement and other public safety agencies. The Brief filed by the City of Detroit as *Amicus Curiae* last Spring in *Boston Firefighters Union, Local 718* v. *Boston Chapter, N.A.A.C.P.*, 103 S.Ct. 2076 (1983) (*remanded for consideraton of mootness*), sets forth in detail the devastating effects of the exclusion of minorities from the police departments of Detroit and other cities. For the convenience of the Court, the following includes a summary of the more detailed discussion included in our *Boston Firefighters* brief.

## A. The Experience Of The City Of Detroit

Detroit has suffered severe law enforcement problems as the result of racially-based police-community tensions. These tensions and their devastating impact on the safety of Detroit's citizens have been traced directly to the years of neglect in the recruitment, hiring and advancement of black police officers. *See Baker* v. *City of Detroit*, 483 F. Supp. 930, 996-97 (E.D. Mich. 1979), *aff'd sub nom. Bratton* v. *City of Detroit*, 704 F.2d 878 (6th Cir. 1983), *cert. pending*, No. 83-551. Major riots in 1943 and 1967, as well as several other civil disturbances which occurred both before and after 1967, are examples of the breakdown of police community relations.

Prior to 1974, six to eight Detroit police officers were killed in the line of duty each year. Moreover, the prevading belief throughout Detroit's black community was that the police had no interest in investigating black-on-black crime. This resulted in a loss of essential citizen cooperation in the efforts of the police department to fight crime. At the same time Detroit police officers were afraid to enter the black communities. Discriminatory police practices were common, and instances of violent conduct by police officers were widespread. The situation was described by the District Court in *Baker*:

> [T]he Police Department was regarded as an "occupation army" in the black community and was treated as such. . . . Officers were afraid to venture into the [black] community for fear of being harassed or worse.
>
> . . . The primary cause was discriminatory practices. Racial criteria entered into the everyday judgments of police officers regarding who they

stopped, searched or detained and how they did it. Racial slurs were common. Police brutality against black citizens was less common but still severe.

* * *

Witness after witness at trial testified that discriminatory police practices were common. . . . Chief Hart testified that "[i]t's a matter of public record that members of the black community have been beaten up by police unjustifiably and without cause; it's a matter of record."

* * *

The Department paid a heavy price for its discriminatory practices. The defendants have accurately characterized what resulted as a "cycle of violence" as the Department and the black community warred on each other.

* * *

The black community's response to Department practices was deep hatred and alienation. Not only did the community hate the police, it had no confidence in the police's interest in investigation or solving black on black crime. This lack of confidence was justifiable. The result was that the police got no cooperation from the black community in solving crime.

This is significant because citizen cooperation is essential to solve crime. Lack of support in the black community was devastating to the Department's efforts to police the City. This was the view of Police Chief Hart, and former Chiefs

> Tannian and Murphy. So substantial was the community's alienation that at times there was active interference with officers performing their duty. . . . The police themselves — and ultimately the citizens of Detroit — were the real victims of discriminatory practices.

483 F. Supp at 996-97.

Only after many painful experiences was the City of Detroit willing to acknowledge and respond to the destructive consequences of its extreme underutilization of black police officers. The 1967 riots jolted the City into realizing the necessity that something be done to correct these imbalances. *See id.* at 946. Between 1967 and 1973, *amicus* made some efforts to recruit, hire and promote blacks, but these efforts were not successful. *Id.* at 947-52.

Finally, in 1974, the City adopted a voluntary affirmative action plan of hiring and promotion. *Id.* at 963-64. As a result of these efforts, the ability of *amicus* to deliver effective police service has dramatically improved. Evidence of the effectiveness of Detroit's affirmative action measures includes improvements in police community relations, lower crime rates, and a reduction in the number of police officers killed in the line of duty. In *Baker*, the district court detailed the resulting improvements, and concluded:

> There is clear evidence in the record that before 1974 there existed enormous tension between the Department and the black community. There is clear evidence in the record that after the institution of the affirmative action program, police-community relations improved substantially, crime went down, complaints

> against the Department went down, and no police officers were killed in the line of duty. High ranking police officials attributed this change to the affirmative action program and its general aim of having the Department — at all levels — reflect the City's population.

*Id.* at 1000.

In the experience of *amicus*, the ability to make race-conscious employment decisions has been the critical ingredient in efforts to restore community trust in Detroit's law enforcement agencies and to facilitate Detroit's ability to protect the lives and property of its people. Particularly in this type of situation, where a city must implement and maintain an affirmative action plan in order to assure public safety, operational needs necessitate that a district court have the power to preserve affirmative action gains in subsequent fiscal years. In upholding Detroit's affirmative action plan for promotions to the rank of lieutenant, the district court in *Baker* determined that:

> the operational needs argument makes a great deal of sense. More black officers in the Department did not necessarily mean that prejudicial attitudes would go away, but it did mean that prejudicial practices would be reduced. . . . Increasing the number of black officers broke the occupational solidarity which made discriminatory practices easy.
>
> Correspondingly, increased numbers of black officers provided reassurance to the black community that the City was serious about eliminating discrimination. The presence of black officers was instrumental in breaking the cycle of

> alienation and violence. The presence of black officers was a critical factor in changing the black community's perception of the police and winning their cooperation in fighting crime.

*Id.* at 998. And finally, the court concluded that:

> upon careful review of the testimony, . . . no reasonable person could fail to conclude that given the history of antagonism between the Department and the black community, the affirmative action plan was a necessary response to what had been an ongoing city crisis.

*Id.* at 1000.

Detroit's experience also demonstrates the need for remedial measures to redress the underrepresentation of minorites in municipal fire departments. "For more than a century, the City of Detroit's Fire Department was, for all practical purposes, the private preserve of white males. No black ever served in the Department until 1938, and until the 1970's black representation was minimal." *Van Aken* v. *Young*, 541 F. Supp. 448, 450 (E.D. Mich., 1982), *appeal pending*, No. 82-1570 (6th Cir.). In 1977, the City implemented an affirmative action program that substantially increased the number of blacks in the Fire Department. The affirmative action program has resulted in a greater degree of cooperation by minority citizens in arson investigations and greater receptivity to fire prevention information. Benefits have been derived in the area of crowd control, fire prevention, arson investigation and a lower incidence of false alarms.

The District Court in *Van Aken* concluded that "increased racial balance in the Fire Department resulted in an enhanced ability to prevent and fight fires." 541 F.

Supp. at 460. This conclusion was based on evidence that the Fire Department had received more public support and cooperation which resulted from respect and confidence in the Department. The district court was "persuaded that many of the [public support and cooperation] factors [demonstrated in police cases] also impact upon the unique role played by fire-fighters in our society, and the evidence in this case supports such a conclusion" *Id.*

**B. The Experience Of Other Communities**

In many other cities, overwhelming evidence of similar experiences demonstrates that the crisis experienced by Detroit is only one example of the nationwide problem. Recently in *Detroit Police Officers' Ass'n* v. *Young*, 608 F.2d 671, 695 (1979), *cert. denied*, 452 U.S. 938 (1981), the Sixth Circuit collected and summarized the many studies that make the importance of having racially representative police forces in our cities judicially noticeable. The operational need to have a minority presence in public safety agencies that is representative of the minority population of the community served:

> is based on law enforcement experience and a number of studies conducted at the highest levels. *E.g.*, National Advisory Commission on Criminal Justice Standards and Goals, *Police* (1973); National Commission on the Causes and Prevention of Violence, Final Report: *To Establish Justice, To Insure Domestic Tranquility* (1969); Report of the National Advisory Commission on Civil Disorders (1968); President's Commission on Law Enforcement and Adminstration of Justice, *Task Force Report: The Police* (1967). As these reports emphasize, the relationship

between government and citizens is seldom more visible, personal and important than in police-citizen contact. See *To Establish Justice, supra* at 145; *Report on Civil Disorders, supra*, at 300 (New York Times edition)

It is critical to effective law enforcement that police receive public cooperation and support. *Report on Civil Disorders, supra* at 301; *Task Force Report: The Police, supra* at 144-45, 167; *Police, supra* at 330.

These national commissions recommended the recruitment of additional numbers of minority police officers as a means of improving community support and law enforcement effectiveness. In fact, the benefits of Negro officers were recognized as early as 1931 by the "Wickersham Commission." *Report on the Causes of Crime* 242, National Commission on Law Observance and Enforcement (Vol. I, 1931).

In 1967, a presidential commission stated . . . :

> In order to gain the general confidence and acceptance of a community, personnel within a police department should be representative of the community as a whole.

*Task Force Report: The Police, supra* at 167.

608 F.2 at 695.

The Court of Appeals in *Young* also found that the operational needs of a police department can justify an affirmative action program:

> The argument that police need more minority officers is not simply that blacks communicate better with blacks or that a police department should cater to the public's desires. Rather, it is that effective crime prevention and solution depend heavily on the public support and cooperation which result only from public respect and confidence in the police. In short, the focus is not on the superior performance of minority officers, but on the public's perception of law enforcement officials and institutions. It is therefore apparent that the district court misconstrued this justification for affirmative action, and that the justification offered by defendants is a substantial one.

*Id.* at 696.[3]

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[3] Other courts of appeals have agreed with the Sixth Circuit concerning the operational need for a racially representative police force. *See Boston Chapter, N.A.A.C.P., Inc.* v. *Beecher*, 679 F.2d 965, 977-78 (1st Cir. 1982), *remanded for consideration of mootness sub nom. Boston Firefighters Union, Local 718* v. *Boston Chapter, N.A.A.C.P.*, 103 S.Ct. 2076 (1983); *Talbert* v. *City of Richmond*, 648 F.2d 925, 931 (4th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982); *Bridgeport Guardians, Inc.* v. *Members of the Bridgeport Civil Service Comm'n*, 482 F.2d 1333, 1341 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1975).

Studies completed since the *Young* decision also have found a strong link between discriminatory employment practices and police-community hostility. In a report published in October 1981, the United States Commission on Civil Rights found:

> Serious underutilization of minorities and women in local law enforcement agencies continues to hamper the ability of police departments to function effectively in and earn the respect of predominantly minority neighborhoods, thereby increasing the probability of tension and violence.

U.S. Commission on Civil Rights, *Who is Guarding the Guardians: A Report on Police Practices* 5 (1981). Following an investigation into the May 1980 racial disturbance in Miami, Florida the U.S. Civil Rights Commission observed:

> In Dade County, an essentially white system administers justice to a defendant and victim population that is largely black. The lack of minorities throughout the criminal justice system maintains the perception of a dual system of justice.

U.S. Commission on Civil Rights, *Confronting Racial Isolation in Miami* 290 (1982).

## CONCLUSION

We have focused primarily upon the operational needs of public safety agencies because that is the public service in which Detroit has experienced the greatest problems because of exclusion and underutilization of minorities and has achieved the most striking success as the result of affirmative action. Acceptance of the broad arguments advanced by petitioners would have far-reaching effects beyond the facts of the Memphis Fire Department situation. Such a ruling would destroy the ability of financially-strapped cities to find alternatives to destructive layoffs in all public services, including law enforcement. Such a result would threaten the ability of cities to maintain effective public services. At minimum, where public safety is at risk, alternatives must be available and encouraged. The decision of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

DONALD PAILEN
Corporation Counsel
FRANK JACKSON*
Deputy Corporation Counsel
1010 City County Building
Detroit, Michigan 48226

*Attorneys for the City of Detroit as Amicus Curiae*

*Counsel of Record

Dated: October 27, 1983